IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 422

OFFICE EMPLOYES INTERNATIONAL UNION, LOCAL NO. 11, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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MISCELLANEOUS

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the National Labor Relations Board is reported at 113 NLRB No. 141. The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 235 F. 2d 832.

JURISDICTION

Certiorari was sought to review a judgment of the Court of Appeals for the District of Columbia Circuit entered on June 21, 1956. Jurisdiction of this Court was invoked under 28 U. S. C. Section 1254 (1). Certiorari was granted November 13, 1956.

THE STATUTE INVOLVED

National Labor Relations Act 61 Stat. 136 as amended, Section 2(2), 29 U. S. C. Sec. 152(2):

> "(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal reserve bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

QUESTIONS PRESENTED

1. Whether the refusal of the National Labor Relations Board to assert jurisdiction over unfair labor practices of Teamsters Unions as employers against their own employees was contrary to the expressed will of Congress and thus arbitrary and capricious?

2. Whether the National Labor Relations Board acted arbitrarily and capriciously in placing labor unions as employers in a category with religious, educational, and scientific organizations for jurisdictional purposes?

STATEMENT OF THE CASE

Petitioner is labor union in Portland, Oregon, and is a constituent part of the Office Employes International Union, AFL-CIO. The Office Employes International Union and all its affiliated local unions are

primarily engaged in representing office and clerical employees for the purposes of collective bargaining.

In 1954, petitioner filed a series of charges with the National Labor Relations Board alleging that several unions and other affiliates of the International Brotherhood of Teamsters, and also including the International union, as employers, had committed various unfair labor practices against their own office and clerical employees. Six complaints were issued by the General Counsel of the Board, charging the International Brotherhood of Teamsters and its affiliates involved,[1] hereinafter referred to as the Teamsters, or Teamster organizations, as employers, with violations of Sections 8 (a) (1), (2), (3), (4), and (5) of the National Labor Relations Act, 29 U. S. C. A. Sec. 158 (a) (1), (2), (3), (4), and (5), embracing each and every one of the employer unfair labor practice provisions of the law.

Extensive hearings were held before a Trial Examiner and his Intermediate Report was issued on January 10, 1955 (R. 194a), in which he sustained virtually all the charges. Among the various Teamster respondents, violations were found of all five of

[1] The Teamster organizations involved were: (1) the International Brotherhood of Teamsters, (2) Teamster Local No. 206, Portland, Oregon, (3) Teamster Local No. 223, Portland, Oregon, (4) Teamsters' Joint Council of Drivers No. 37, Portland, Oregon, which coordinates the activities of 23 Teamster local unions in Oregon and Washington, (5) Oregon Teamsters' Security Plan Office, Portland, Oregon, which administered trust funds established by collective bargaining agreements between various Teamster locals and employers in Oregon, Washington, Idaho and Montana, and (6) Teamsters Building Association, Inc., a nonprofit corporation owning and operating a small office building in Portland, whose tenants were exclusively Teamster organizations (R. 230a-231a).

the employer unfair labor practice provisions of the law.[2] These sweeping violations brought forth the caustic comment by dissenting NLRB Members Rodgers and Leedom that the Teamster violations not only ran the entire gamut of employer unfair labor practices, but also included at least one novel variation, in that no case had previously been found in the entire 20 years of the Board's experience where an employer had visited reprisals upon Board witnesses even before they had testified (R. 241a).

The Examiner found that jurisdiction should be asserted over the Teamsters unions as employers. In the only previous NLRB decision on jurisdiction over labor unions as employers, *Air Line Pilots Association*, 97 NLRB 929, the Board had found that Congress intended that labor unions be treated like any other employer with regard to their own employees, that the union employer involved was multi state in character, and that jurisdicton would therefore be asserted. Following this precedent, the Examiner found the

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[2] The Examiner found that the International, Security Plan Office, and Locals 206 and 223 had violated Section 8 (a) (1) and (2) of the Act by their solicitation of employees of the Security Plan Office and Locals 206 and 223 to join Local 223 rather than petitioner; that Security Plan Office, Building Association, and Joint Council had violated Sec. 8 (a) (1), (2), (3), and (4) of the Act by unlawfully discharging three employees and one supervisor in anticipation of their giving testimony at a Board hearing in support of charges in one of the complaints; that Local 206 had violated Sec. 8 (a) (1) and (3) by discharging an employee because she had refused to cross a picket line established by petitioner; that Security Plan Office had violated Sec. 8 (a) (5) by refusing to bargain with petitioner, although petitioner represented a majority of the employees of Security Plan Office; and that the International and one of its representatives, Sweeney, had violated Sec. 8 (a) (1) of the Act by seeking to influence the testimony of a witness at a Board hearing (R. 240a).

Teamsters unions well within the meaning of the term "multi-state enterprise", that their activities affected commerce, and that it would effectuate the policies of the Act to take jurisdictions over them [3] (R. 232a).

Exceptions to the Trial Examiner's Intermediate Report were filed with the NLRB, oral argument was heard limited to the question of the exercise of the Board's jurisdiction, and on August 25, 1955, the Board handed down its decision, refusing to assert jurisdiction over these unions as employers. Accordingly, the complaints were dismissed.

The controlling majority of the Board, Chairman Farmer and Member Peterson, set forth their reasoning in this manner:

1. While the Teamsters were employers under the Act, the Board was free to determine whether or not their activities affected commerce and whether it would effectuate the policies of the Act to take jurisdiction, which was consistent with "the undisputed legislative intent" to empower the Board to decide whether to assert jurisdiction over particular employers (R. 233a).

2. All the Teamster organizations were nonprofit in character, whose basic aims were to improve the "working conditions of workers, increase their job se-

[3] The Examiner found that the International Brotherhood of Teamsters was a national labor organization with 872 chartered local unions and 1,204,477 members, and in the year ending December 31, 1953, had a total revenue of $6,587,327, of which $5,755,232 represented remittances to its offices in Washington, D. C. He further found that the International and its constituent locals constituted one integrated ,closely-knit national organization (R. 94a).

curity, and otherwise promote their general welfare" (R. 233a).

3. Accordingly, the Teamster employers, for jurisdictional purposes, must be treated like other nonprofit organizations.

4. Jurisdiction is not normally asserted over nonprofit employers; therefore, since the Teamsters are nonprofit and they are not engaged in commercial ventures, jurisdiction will not be asserted over their activities (R. 234a).[4]

Member Abe Murdock concurred in a separate opinion, which was not briefed or argued by the Board in the Court of Appeals, and accordingly, the concurring opinion will not be treated further here, since the Court of Appeals did not consider it, and since petitioner believes the Board will not urge it upon this Court.

Two dissenting NLRB Members, Rodgers and Leedom, expressed their strong disagreement with the Board holding in arguments that are somewhat similar to those advanced by petitioner hereinafter.

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[4] The Board majority said that, accordingly, effect upon commerce within the meaning of the Act had not been established (R. 234a). However, earlier in its opinion (R. 230a), it stated: "The Board finds that it will not effectuate the policies of the Act to assert jurisdiction in this proceeding . . ." The two dissenting members, Rodgers and Leedom, apparently assumed that the Board was not asserting jurisdiction because it would not effectuate the policies of the Act (R. 243a). In view of the previously cited figures that Teamster operations in 1953 involved more than five and one-half million dollars passing across state lines, the Board could hardly find that commerce was not affected. Petitioner believes the only reasonable interpretation of the NLRB ruling is that the Board declined jurisdiction on the grounds that it would not effectuate the policies of the Act.

The majority of the Court of Appeals said "the decision fell within the broad discretion which seems to be established as applicable to the Board's actions in entertaining complaints."[5] With regard to Sec. 2 (2) of the Act, the Court of Appeals said that provision put labor organizations in the category of employers as to their own employees, but it did no more than that. Then, in summation of its reasoning, the Court concluded:

> "The conclusions of the Board with reference to the non-profit character of these labor organizations, the reasoning with which it supports its criteria for jurisdiction, and the applicability of those criteria to the Teamsters are rational. We cannot say they are arbitrary or capricious. Our function in these areas of administrative discretion goes no further."

Judge Bazelon dissented, stating that Sec. 2 (2)'s strikingly particular reference to labor unions sharply differentiated them from non-profit organizations generally. Hence, he concluded, the Board erred in applying standards governing non-profit organizations generally as a basis for refusing to assert jurisdiction.

Certiorari to the Court of Appeals was sought, the writ was granted on November 13, 1956, and the case is here seeking reversal of the erroneous ruling of the Court of Appeals.

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[5] The Court of Appeals then cited *Labor Board* v. *Denver Bldg. Council*, 341 U. S. 675, where this Court said, at 341 U. S. 675, 684: "Even when the affect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case."

SUMMARY OF ARGUMENT

When the National Labor Relations Board declines to assert its jurisdiction in a manner that is contrary to the intent of Congress, the Board acts arbitrarily and erroneously as a matter of law. Congress, when it included unions when acting as employers within the statutory definition of employer, intended that union employers be held liable for their unfair labor practices. The inclusion of unions when acting as employers within the employer definition of Sec. 2 (2) of the Act could not have meant that Congress was reposing in the Board a discretion to remove unions as employers from the coverage of the Act after Congress had specifically included them.

The legislative history also shows the affirmative intent of Congress. In both the 73rd and 74th Congresses, Senator Wagner introduced a labor bill that excluded unions as employers from the law altogether. Witnesses in hearings in both Congresses were critical of this blanket exclusion and on each occasion, the Senate Committee amended the original bill to bring unions within the coverage of the Act when they were acting as employers.

The Board, supported by the Court of Appeals, has claimed that all the statute does is include unions as employers and leave the Board free to exercise its discretion as to whether it will take jurisdiction over these employers. But just as the Board does not have discretion to decline jurisdiction over all employers, neither does it have the discretion to exclude an entire class of employers without some sanction from Congress, or some affirmative reasons based upon inferences reasonably drawn from Congressional sanction. There is not only an absence of Congressional sanction for the ex-

clusion of union employers as a class, but there is specific Congressional inclusion of them within the statute.

It was arbitrary and unreasonable for the Board to place unions as employers within a jurisdictional category of so-called non-profit, non-commercial employers. The Board has Congressional sanction for declining jurisdiction over employers engaged in religious, charitable, scientific, literary, or educational activities, but this approval was granted in a specific context that included labor union employers within the Act. As Judge Bazelon said in his dissent in the Court of Appeals, Section 2 (2)'s strikingly particular reference to unions as employers distinguishes them from nonprofit employers generally, and it was wrongful for the Board to place unions in such a jurisdictional category. The Board itself in its opinion in this case recognized that unions are "institutions unto themselves."

Furthermore, to exclude union employers from the coverage of the Act after Congress specifically included them, the Board ought to be held to a strong showing of how it would affirmatively effectuate the policies of the Act to exclude union employers. The Board has not done so, since the mere inclusion of union employers within a category of so-called nonprofit employers is no reasoning at all. Equity and sound policy dictate that union employers should be held liable for their unfair labor practices just as other employers are.

ARGUMENT

I. THE REFUSAL OF THE NATIONAL LABOR RELATIONS BOARD TO ASSERT JURISDICTION OVER UNFAIR LABOR PRACTICES OF TEAMSTERS UNIONS AS EMPLOYERS WAS CONTRARY TO THE EXPRESSED WILL OF CONGRESS AND THUS WAS ARBITRARY AND CAPRICIOUS.

(a) The Labor Board Has No Authority to Ignore the Intent of Congress in Establishing Jurisdictional Criteria.

The fundamental premise on which petitioner's first argument is based is that when the National Labor Relations Board establishes a discretionary jurisdiction which is contrary to the intent of Congress in enacting the statute, this NLRB action is arbitrary and capricious, and thus wrongful as a matter of law. This must be so, or else the administrative agency would place itself in the position of substituting its judgment for that of Congress, which it has no authority to do. The most precise judicial expression of this premise came in the recent Second Circuit ruling in *Pederson* v. *NLRB,* ..... F. 2d ....., 38 LRRM 2227, where the Labor Board was reversed for an abuse of its discretion in rejecting jurisdiction over an unfair labor practice proceeding. "Where the Board acts arbitrarily or capriciously or *where its action conflicts with a clear purpose of the statute,* it has exceeded its authority," ..... F. 2d ....., ..., 38 LRRM 2227, 2229 (Emphasis added).

Petitioner believes this premise is so well-founded and unquestioned that it wishes to turn quickly to the next phase of the argument, to demonstrate that it was the intention of Congress that labor union employers be held liable for their unfair labor practices.

(b) Congress Desired That Union Employers Be Held Responsible for Their Unfair Labor Practices.

It is undisputed that Sec. 2 (2) of the Act provides that when labor unions deal with their own employees, they are covered by the statute as employers. The Court of Appeals thought, and the two controlling NLRB members thought, that this statutory provision meant only that union employers were subject to the law, and that thereafter, the Board was free to deal with them as it does with any other employer with regard to whether it will assert or decline jurisdiction. The implications of this reasoning are that Congress must have said, "We will bring unions as employers within the coverage of the law, but we will leave it to the Board to determine whether or not it wishes to assert its jurisdiction over their activities," or stated differently, "While we have specifically included unions as employers within the law, the NLRB, if it wishes, may nullify our inclusion in its discretion."

It is petitioner's position, of course, that Congress could not have meant to repose a power in the hands of the NLRB to undo what Congress had done in Sec. 2 (2) when it included unions as employers within the statutory coverage. In other words, by its enactment of Sec. 2 (2) and by the legislative history which accompanied it, Congress revealed its intention that labor union employers should be held liable for unfair labor practices just as commercial employers are. And when the NLRB chooses to ignore that intention by declining jurisdiction, such Labor Board action becomes arbitrary and capricious, and thus wrongful as a matter of law.

The specific statutory reference in Sec. 2 (2) to unions as employers is in itself a strong indication of

the affirmative desire of Congress. But when the legislative history of the provisions is added to the statutory language, it is difficult to understand how both the Board majority and the Court of Appeals majority could have concluded that Sec. 2 (2) did no more than include unions as employers within the Act and leave the Board free to use its discretion as to whether or not it would assert its jurisdiction.

A comprehensive national labor law was first proposed in the Second Session of the 73rd Congress in 1931 when bills were introduced in both the Senate and the House. The late Senator Robert F. Wagner (D., N. Y.), the father of our modern labor law, introduced S. 2926 in 1934, which was favorably reported out of the Senate Committee on Education and Labor, but failed of enactment into law.

When Sen. Wagner first introduced S. 2926, it contained in the exclusion from the definition of employer this language, "or any labor organization . . .,"[6] thus demonstrating that Sen. Wagner intended that unions as employers be excluded from the statute's coverage. During hearings on S. 2926, several employer witnesses were openly critical of the exclusion of labor organizations from the definition of employer.[7]

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[6] NLRB Compilation of Legislative History of NLRA, 1935, p. 2.

[7] "There is no reason why a labor organization or anyone acting in the capacity of an officer or agent of such labor organization who hires employees should not be termed and considered an employer. No reason exists why labor organizations should be exempt from the provisions of this Act." Remarks of L. L. Balleisen, secretary, Industrial Division, Brooklyn Chamber of Commerce, Board Compilation, p. 690.

"This exclusion of labor organizations as employers is unfair per se if the philosophy of the bill itself is consistent with justice. It is, no doubt, based upon the erroneous assumption that anyone

Consequently, the language of Section 3 (2) of S. 2926 (the predecessor of present Section 2 (2), was amended in committee to read, "or any labor organization (other than when acting as an employer) . . ."[8] This is the exact language that exists in the law today.

When S. 2926 was reported favorably out of committee, it was accompanied by Senate Report No. 1184, 73rd Congress, 2nd Sess., May 26, 1934, which contained the following explicit explanation of why the language of the provision under scrutiny was so written:[9]

> "The reason for stating that 'employer' excludes 'any labor organization, other than when acting as an employer' is this: In one sense every labor organization is an employer, it hires clerks, secretaries and the like. In its relations with its own employees, a labor organization ought to be treated as an employer, and the bill so provides. But in relation to other employees it ought not to be treated as an employer, and ought to have the right to use lawful means to induce employees to join the organization."

In the First Session of the 74th Congress in 1935, Senator Wagner again introduced his labor bill as S. 1958,[10] and this bill a few months later became the

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working for a labor organization is perforce guaranteed the same treatment as is provided for in the bill. . . ." Remarks of Leslie Vickers, economist, American Transit Association, Board Compilation, p. 720. Mr. Vickers was rightfully foreseeing the kind of conduct which the Teamster respondents below engaged in twenty years later.

[8] NLRB Compilation of Legislative History of NLRA, 1935, p. 1085.

[9] NLRB Compilation, p. 1102.

[10] NLRB Compilation, p. 1295.

National Labor Relations Act, popularly known as the Wagner Act. Senator Wagner's bill again excluded unions as employers.[11] During the hearings that followed, there was again criticism of the exclusion of unions as employers from the coverage of the bill.[12] When S. 1958 was reported out by the Committee on Education and Labor on May 2, 1935, Section 2 (2) was changed to read as did the employer exclusion provision in S. 2926 in the 73rd Congress after that bill was reported favorably,[13] back to the present language of the law.

Senate Report No. 573, 74th Congress, 1st Sess., accompanying S. 1958, had this statement concerning the treatment of unions as employers in Section 2 (2):[14]

> "The term 'employer' excludes labor organizations, their officers and agents (except in the extreme case when they are acting as employers in relation to their own employees). Otherwise the provisions of the bill which prevent employers from participating in the organizational activities of workers would extend to labor unions as well, and thus would deprive unions of one of their normal functions."

Apparently, the reason for the partial exclusion of unions from the employer definition was because Section 8 (1) of the Wagner Act prohibited employers

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[11] NLRB Compilation, p. 1296.

[12] Robert C. Graham, vice president of Graham-Paige Motors Corp., in listing criticisms of the bill, enumerated this one as follows: "This bill, in paragraph (2) of Section 2, excludes 'any labor organization from any of the requirements to which employers are subjected by this bill'." Board Compilation, p. 1990.

[13] NLRB Compilation, p. 2286.

[14] NLRB Comilation, p. 2305.

from interfering in the activities of employees. Since, as the Senate Committee in the 73rd Congress indicated, "every labor organization is an employer," Congress wanted to make sure that there could be no errant interpretation that unions could not participate in the organizational activities of employees.

Now, in retrospect, how does this legislative history affirmatively show that it was the intent of Congress that unions as employers be held liable for their unfair labor practices? Or does this history do no more than the Board claimed, and as the Court of Appeals apparently thought, that is, merely included unions as employers and no more than that, and left it to the Board to make a determination as to whether jurisdiction should be exercised?

First of all, the inclusion of unions as employers was an affirmative decision of Congress after the original bills had excluded them altogether. Senator Wagner, the author of the Act, twice attempted to exclude unions from the employer definition, which would have given us the same result that the Board has arrived at in its ruling in this case. But Congress rejected that action, and wrote specific language into the statute to cover unions as employers.

The chain of circumstances leading to this affirmative inclusion of unions as employers is a powerful demonstration of what Congress intended. In 1934, the Senate Committee, with Wagner's bill before it, heard witnesses complain about the unfairness of excluding unions from the employer definition. The Committee amended the bill and brought unions as employers within its scope. But Sen. Wagner, with knowledge of this 1934 action, came back again in 1935 with the same exclusion that he had offered in his 1934 bill.

Again, the cry of unfairness was raised before the Committee, and the Committee responded by again bringing unions as employers within the scope of Sec. 2 (2). The remedy for this unfairness was to define unions as employers so they would be held liable for unfair labor practices, and Congress demonstrated that it wanted this result when it amended Sec. 2 (2). When this progression of events leading up to the enactment of the Labor Act is considered, it seems utterly unrealistic to accept the implications flowing from the Board decision—that Congress meant no more than to include unions as employers and leave it to the Board to exercise its discretion as to whether it would hold them liable for their unfair labor practices. Is there any one among us who really believes that?

Secondly, the time has come to take a searching look at just how far NLRB discretion extends. The Board has said in this case that while Sec. 2 (2) makes the union an employer, we have complete discretion to decide whether to take jurisdiction over employers. But is this so?

That the Board has some discretion we cannot dispute. But its discretion does not mean that it can decline jurisdiction over all employers, or else it could repeal the Act. In the past, the Board has primarily exercised its discretion with regard to jurisdiction in two areas: one, it has established jurisdictional yardsticks based upon a dollar volume of business to decline jurisdiction over a whole strata of smaller employers who are at or near the bottom of the financial scale among enterprises that affect the stream of commerce;[15] and two, it has used its discretionary powers

[15] *Breeding Transfer Co.*, 110 NLRB 493.

to decline jurisdiction in particular cases involving particular circumstances where it was thought that enforcement powers would not effectuate the purposes of the Act.[16] This was the kind of situation the Court of Appeals for the Third Circuit was undoubtedly referring to in *NLRB* v. *Newark Morning Ledger Co.*, 120 F. 2d 262, at 268 (C. A. 3), when it remarked that Congress "reposed in the Board complete discretionary power to determine in each case whether the public interest requires it to act," and the Board's "jurisdiction is not to be exercised unless in the opinion of the Board the unfair labor practice complained of interferes so substantially with the public rights created by Section 7 as to require its restraint in the public interest."

Aside from these two primary areas where Board discretion concerning jurisdiction has been exercised, there is a third which concerns us most closely here. In this case, the Board has undertaken to exclude a whole class of employers (all labor unions who employ persons) from the coverage of the Act, claiming that it has the discretion to do so. Now, should the Board attempt to exclude the entire class of employers who manufacture automobiles or the entire class of em-

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[16] As illustrative, see *Godchaux Sugars, Inc.*, 12 NLRB 568, 576-579 (union had agreed not to press charges if employer would agree to an election); *Consolidated Aircraft Corp.*, 47 NLRB 694, 706-707 (failure of parties to exhaust arbitration procedures of their contract); *Timken Roller Bearing Co.*, 70 NLRB 500, 501 (union had instituted arbitration proceedings); *Allis-Chalmers Mfg. Co.*, 72 NLRB 855 (execution of contract rendered affirmative order unnecessary); *The McDonald Cooperative Dairy*, 58 NLRB 552, 553 (essentially local character of employer's business); cf., *Bausch & Lomb Optical Co.*, 108 NLRB 1555, where the Board relieved the employer of his obligation to bargain with a union chosen by his employees because these union members owned stock in a competing corporation.

ployers who manufacture steel, there ought to be instant recognition that such selectivity would be arbitrary and wrongful in law. There ought to be recognition that when the Board attempts to exclude any class of employers from coverage of the Act that such attempted exclusion ought to be carefully scrutinized and permitted to stand only upon the strongest justification.

The Board, of course, has excluded certain classes of employers from the coverage of the Act. Two of the most prominent are hotel employers and taxicab employers.[17] In its leading decision on hotels, *Hotel Association of St. Louis,* 92 NLRB 1388, the Board looked for Congressional guidance, and relied upon remarks by Senator Taft [18] as an indication that Congress considered the hotel industry as primarily local in character, and as such, one which should not be subject to NLRB jurisdiction. From this and other sources, there is drawn the implication (and perhaps rightfully so) that Congress was willing to allow the Board to use its discretion in excluding entire classes of employers or entire industries from the jurisdiction of the Act when their activities were primarily local in character, and their activities did not exert an appreciable influence on the stream of commerce. This is, of course, akin to the dollar volume jurisdictional standards adopted by the Board to exclude smaller employers whose business does not sufficiently affect commerce to warrant use of the Board's processes. Within

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[17] *Hotel Association of St. Louis,* 92 NLRB 1388 (hotels), and *Checker Cab Co.,* 110 NLRB 683 (taxicabs). Petitioner, however, would not want to concede that jurisdiction was properly declined over these industries.

[18] See discussion of this point in dissenting opinion of NLRB Members Rodgers and Leedom, R. 244a.

this line of reasoning, the Board has declined jurisdiction over some entire classes of employers.

Prior to this case, the Board had also declined jurisdiction over entire classes of employers engaged in religious, charitable, scientific, literary or educational activities, or cultural activities closely related thereto (which the Board has attempted to broaden to include all so-called non-profit, non-commercial employers).[19] Once again, the Board found Congressional approval in legislative history for such a broad exclusion of jurisdiction.[20]

Thus, petitioner contends that for the Board to exclude an entire class of employers from the coverage of the Act, there must be either 1. specific Congressional approval, or 2. strong, rational reasons based upon inferences which may be drawn from Congressional intent. Any other broadscale exclusions of entire classes of employers would be arbitrary and capricious.

(Of course, the Board may well argue here that all it has done is place unions in the proper category of non-profit, non-commercial employers for jurisdictional purposes, and that it has the requisite Congressional approval for declination of jurisdiction. But this is wrongful, as this brief will point out hereinafter. Furthermore, petitioner is attempting here to demonstrate that the Board may not decline jurisdiction over unions as employers even if it placed them

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[19] *Lutheran Church, Missouri Synod*, 109 NLRB 659; *Armour Research Foundation*, 107 NLRB 1052; *Philadelphia Orchestra Association*, 97 NLRB 548; *Trustees of Columbia University*, 97 NLRB 424.

[20] House Report No. 510, 80th Cong., 1st Sess., 32 (1947).

in some other category than non-profit, non-commercial employers.)

In this case, there is a specific statutory inclusion of unions as employers within the coverage of the law. This specific statutory reference, combined with the supporting legislative history, shows the affirmative intent of Congress that unions as employers should be held liable for their unfair labor practices. Now, this is not to say that the Board is deprived of its discretion to decline jurisdiction over *some* unions as employers, in the event there is a rational finding that some of these smaller union employers exert such meager affect upon commerce that it would not effectuate the policies of the Act to take jurisdiction over them. This vertical line-drawing of jurisdictional standards might be accomplished in a similar manner to that done with regard to all employers generally. But it is the total exclusion of unions as employers from the coverage of the Act that violates the intent of Congress, and that is arbitrary and wrongful.

The Board is apparently disturbed over this line of reasoning. It argued in the Court of Appeals below that it is not declining jurisdiction over all union employers as a class, but is declining jurisdiction only over union employers engaged in traditional trade union activities. When these unions as employers engage in commercial activities, jurisdiction will be asserted. The Board decision in this case implied this same line of reasoning (R. 234a).

In all fairness, this diversionary argument is unworthy of the National Labor Relations Board. The Board has implied, and its attorneys have argued below and will presumably argue again here, that unions as employers do occasionally engage in commercial

businesses. Now, there is no finding of fact in any record that unions have employees engaged in commercial enterprises. Because there might be magazine statements and arguments of individuals in Congressional hearings [21] that unions engage in business does not establish as a fact that unions have empoyees who produce goods for commerce. As a matter of fact, petitioner does not know of a single instance in which a labor union has employees of its own who engage in commercial business. The Board, with this contention before it, has not been able to supply a single example to controvert this argument.[22]

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[21] The Board cited in its Brief in Opposition to Certiorari, p. 9, these sources for the position that unions engage in business: *Nation's Business*, July 1955, pp. 46, 49-50; *Business Week*, January 1, 1955, p. 56; Peterson's *American Labor Unions* (N. Y. London, 1945), pp. 176-177; and Millis and Montgomery, *Organized Labor*, 1945, pp. 344-352.

The Board further cited certain witnesses in Congressional hearings for the proposition that unions engage in business, see Brief in Opposition to Certiorari, p. 8.

[22] The Board cited below, and cited again in its Brief in Opposition to Certiorari, three cases as illustrative of unions engaging in business: *Bausch & Lomb Optical Co.*, 108 NLRB 1555; *Otter Trawlers Union, Local 53*, 100 NLRB 1187; Intermediate Report on *Guayama Bakers*, 27 LRRM 1322, 1323. Petitioner respectfully requests the Board to be more exact in its citations, and properly acknowledge that these cases are not in point to the proposition that unions have employees engaging in commercial business.

For example, in *Bausch & Lomb*, certain union members formed a corporation, in which 332 out of 336 shares of stock were owned by 124 union members, to compete in the optical business. The workmen were employees of the corporation, not of the union. In *Otter Trawlers*, the union did not engage in business at all. Owners of vessels belonged to the union, and the union was held as an agent of these owners of vessels. In *Guayama Bakers*, certain union members formed a membership cooperative to engage in baking. There was no employer-employee relationship, and the union involved had no employees at all.

The unsupported assumption that unions engage in business enterprises is perhaps founded on the fact that unions sometimes invest their funds in commercial businesses. They sometimes purchase stock in corporations, and may even purchase a controlling interest, or may even set up corporations to carry on business enterprises. But in each and every case, it is the corporation that is the employer, not the labor union. It would indeed be strange legal theory to maintain that corporate stockholders are the legal employers, not the corporation. Furthermore, an agency such as the National Labor Relations Board surely is aware of the common fact of labor union life that practically all unions function as unincorporated associations, and that for them to engage directly in commercial business, subjecting their members to individual liability, would be the height of folly.

Furthermore, the corporate employer, even if a union owned all the stock, would be subject to the provisions of the Act as an employer. This would be so even if Congress had enacted the labor statute as Senator Wagner originally attempted, and totally excluded unions as employers from the coverage of the law. Let us be done with the diversionary argument that the Board would take jurisdiction over unions as employers when they engage in commercial business.

Thus, we return to the argument that Congress wanted unions as employers held liable for their unfair labor practices. A Board refusal to take jurisdiction over unions as employers disregards that Congressional purpose. This is arbitrary and capricious action, and the Court of Appeals was in error in not recognizing it.

II. THE BOARD WAS ARBITRARY AND UNREASONABLE IN ITS PLACEMENT OF UNIONS AS EMPLOYERS IN A SO-CALLED NON-PROFIT, NON-COMMERCIAL CATEGORY FOR JURISDICTIONAL PURPOSES.

Without any reasoning to support a result which the dissenting NLRB members called "paradoxical and unwarranted,"[23] the Board majority based its jurisdictional finding in this case on the mere statement that the Teamsters were non-profit organizations (as all unions are), that their trade union functions were not related to commercial business, that the Board did not take jurisdiction over non-profit, non-commercial operations, and therefore, the Board would not take jurisdiction over these union employers.[24] The Court of Appeals, without questioning the absence of a rational discussion of the policies of the Act which would be involved, thought "the Board fashioned a rule out of the material and criteria theretofore established by it for use in a certain category."

Judge Bazelon, in a brief but analytical dissent, said that "Section 2 (2)'s strikingly particular reference

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[23] Members Rodgers and Leedom strongly voiced their opinions on the strange result reached by the Board majority. "We believe such decision achieves a paradoxical and unwarranted result in permitting labor unions to deny to their own employees the very rights and privileges which unions have so vigorously advocated and won for the employees of others. Labor unions are now free to flout the very statutory provisions which they ardently championed, and which have been hailed as the Magna Charta of labor." (R. 239a).

"Employers who have been required to defend themselves before the Board against union charges of discrimination against employees, refusal to bargain with employee representatives, and other forms of interference with employee organizational rights, will no doubt be astonished to learn from the instant decision that the unions which filed the charges against them are free to engage in the very conduct for which they (the employers) are required to answer." (R. 240a).

[24] R. 234a.

to labor unions sharply differentiates them from non-profit organizations generally . . ." and that the Board erred in applying standards governing non-profit organizations generally as a basis for refusing to assert jurisdiction. Aside from all the other considerations in this case, Judge Bazelon's sharp thrust is alone enough to demonstrate the error of the two ruling bodies below.

The Court of Appeals was mistaken when it thought the Board fashioned a rule out of the material and criteria theretofore established by it for use in a certain category. Prior to this case, the Board had never operated under a blanket rule of exclusion of jurisdiction over all non-profit, non-commercial employers. It had declined jurisdiction over the operations of a university library,[25] over a symphony orchestra,[26] over a research laboratory,[27] and over a church-operated radio station.[28] It found legislative approval for this non-assertion of jurisdiction in House Report No. 510, 80th Cong., 1st Sess., 32 (1947), concerning the amendments to the National Labor Relations Act in 1947 which became popularly known as the Taft-Hartley Act.

When H. R. 3020 was passed by the House of Representatives in 1947 as its amended labor statute, the House added to the employer exclusion provisions of Section 2 (2) the following added exclusions: "any corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, or

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[25] *Trustees of Columbia University*, 97 NLRB 424.

[26] *Philadelphia Orchestra Association*, 97 NLRB 548.

[27] *Armour Research Foundation*, 107 NLRB 1052.

[28] *Lutheran Church, Missouri Synod*, 109 NLRB 659.

for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual." The Senate bill did not contain this language, and in conference, the House version above was eliminated. House Report No. 510 explained the reason for this development, as follows:

> "The conference agreement . . . follows the Senate amendment in the matter of exclusion of nonprofit corporations and associations operating hospitals. The other nonprofit organizations excluded under the House bill are not specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act."

The legislative approval for non-assertion of jurisdiction over non-profit employers was limited to religious, charitable, scientific, literary or educational organizations, or to organizations whose purposes are closely related, such as the Philadelphia Symphony Orchestra. There is no Congressional sanction for a blanket exclusion of all non-profit, non-commercial employers. What the Board has done in this case is attempt to place unions as employers in a jurisdictional category hitherto reserved for the university, for the symphony, for the research laboratory, for the church.[29]

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[29] Petitioner is not trying to argue that other non-profit organizations of a cultural or social or fraternal or public service nature should be either included or excluded from Board jurisdiction, for such questions are immaterial here. It is the inclusion of labor unions into this grouping for jurisdictional purposes that is arbitrary and wrongful.

It is this classification that is without reason, and thus wrongful in law.

This legislative approval for non-assertion of jurisdiction over non-profit organizations (religious, charitable, scientific, literary, or educational) could not be rationally extended to cover labor unions, since in the House Bill (H. R. 3020, 80th Congress), the enumeration of these so-called non-profit organizations in the amended Section 2 (2) was immediately preceded by the present language including labor unions as employers "when acting as an employer." Perhaps this is what Judge Bazelon meant when he said "Section 2 (2)'s strikingly particular reference to labor unions sharply differentiates them from non-profit organizations generally."

In any event, the Board itself, in its opinion, recognized that labor unions are "institutions unto themselves within the framework of this country's economic scheme . . ." and later made reference to ". . . the singular characteristics of their institutional operations." (R. 235a).[30] Then, by what right does the Board include this institution unto itself in a jurisdictional category with libraries, churches, and symphonies?

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[30] Apparently, the Board majority was somewhat insecure about the result it reached, since it included a second reason in its opinion for declining jurisdiction. It said that assuming the standards for nonprofit employers were not applicable, it would not take jurisdiction because the General Counsel failed to suggest a proper jurisdictional standard which would be applicable to unions. (R. 235a).

Petitioner was vigorously critical of this reasoning in its argument in the Court of Appeals, and that court quite properly took the Board to task for this portion of its opinion. It is the Board's responsibility for the formulation of jurisdictional criteria, not the General Counsel's, said the Court of Appeals.

It would also seem that, in view of the specific Congressional inclusion of unions as employers within the coverage of the law, and in view of the common sense equity of holding unions as employers responsible for their unfair labor practices just as ordinary business employers are responsible, the Board ought to be required to provide sound policy reasons as to why it would effectuate the policies of the Act to decline jurisdiction over unions as employers. Since the Board majority gave no such reasons, is this not arbitrary and capricious in itself? In other words, when the Board attempts to exclude an employer from the coverage of Act on the grounds that it would not effectuate the policies of the Act to take jurisdiction, the Board ought to be compelled to support such a result with sound reasoning directed squarely at how these policies would not be effectuated. And, *a fortiori,* when Congress specifically places that class of employer within the law's coverage, the burden ought to be even greater on the Board to make a positive, affirmative, rational showing. The absence of this kind of reasoning thus becomes arbitrary administrative action which ought to be vigorously struck down by the courts.[31]

Based upon these considerations, it was error for the Court of Appeals to find that the Board was not arbitrary and capricious in its placing of unions as em-

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[31] There is not only an absence of any policy reasoning in the Board decision, but the policy reasoning provided by the dissenting Board members is overwhelming in its force as to why jurisdiction ought to be positively asserted. It is elementary justice that unions which seek to compel employers to treat their employees fairly ought to also be put to the same standard. It was this shocking unfairness that prompted such a plethora of unfavorable newspaper comment on the NLRB decision, see petition for writ of certiorari in this case, p. 10.

ployers within the category of so-called non-profit organizations for jurisdictional purposes.

CONCLUSION.

For the reasons hereinabove set forth, the decision of the Court of Appeals should be reversed. The case should be remanded to the National Labor Relations Board with directions for it to assume jurisdiction of the complaints and make findings on the substantive issues in this matter.

Respectfully submitted,

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